SUPREME COURT, U.S.

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NO. 997

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

H. M. HARRINGTON, JR., ET AL.,
Petitioners

v.

THE STATE OF TEXAS,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The State of Texas, Respondent herein, opposes the granting of the Petition for Writ of Certiorari because the Supreme Court of Texas has correctly decided the questions raised by the petition and no substantial Federal questions are presented.

STATEMENT OF CASE

In addition to the statement appearing in the petition, the following information will assist in a proper evaluation of this case.

This is what is commonly known as a Texas "slant-well" penalty suit. The case before the Supreme Court of the United States is a Petition for Certiorari from a judgment of the Texas Supreme Court which affirmed a district court judgment based on a jury verdict. The State of Texas, plaintiff in the trial court, sued Peti-

tioners herein for penalties under the provisions of Article 6036, V.A.C.S., because of violations by Petitioners of rules and regulations of the Railroad Commission of Texas, In the trial court it was alleged and the evidence showed that Petitioners obtained from the Railroad Commission a Rule 37 permit to drill an oil well at a specified location, and violated the permit by drilling the well at its proper surface location and then deviating it under the ground so as to cross the property line to a bottom-hole location on the land of other persons, and thereafter operating said well. (Tr. 45-52)

Said Article 6036 provides for a penalty, against any person violating a Railroad Commission rule or regulation "of not more than $1,000 for each and every" act and day of violation.

The case was tried before a jury, which answered the special issues in favor of the Respondent State of Texas and fixed penalties, based on the days of drilling and operation against each of Petitioners herein in amounts considerably less than the maximum authorized by the statute. The trial court entered judgments in the amounts fixed by the jury. (Tr. 213-215).

The evidence in this case shows that (a) the Railroad Commission issued a permit for the well in question to be drilled at a specified location, (b) that the well was drilled in a deviated manner so as to be bottomed off of Petitioners' lease, (c) that the well was "drilled" and "operated" by Petitioners, (d) that the drilling of the well covered a period of sixteen days, and (e) that the well was "operated" for a period of 3,650 days. We will briefly discuss each of those elements.

(a) It was uncontroverted that on February 29, 1952, the Railroad Commission granted to the HAL Company a Rule 37 permit to drill the Harrington-Texas & Pacific Coal & Oil Co. well No. 1 at a location designated as 234 feet south of the north line and 234 feet east of the west line of a 20 acre tract in the Duncombe Survey in the Hawkins Field, Wood County, Texas (Plf. Ex. 12, S.F. Vol. III).

(b) The evidence showed that the well was "slanted" in that the horizontal displacement of the bottom of the well was 1,664.73 feet in a direction of north 87 degrees 56 minutes west from the surface location of the well, that the vertical depth of the well was 4,737.74 feet, and that the actual length of the bore-hole was 5,090 feet (S.F. 280), and that the bore-hole crossed the property boundary line so that the bottom of the well was in a different tract of property than the surface location where the permit authorized the well to be drilled (Plf. Ex. 44, Vol. III). Although this evidence was uncontroverted, the trial court submitted to the jury the question of whether the well was "bottomed" off of Petitioners' lease; and the jury answered "yes."

(c) The evidence was conclusive that Harry M. Harrington, Jr., Reid Allgood, Charles W. Lutes and J. W. Baton "drilled" and "operated" the well. The permit to drill the well was issued by the Railroad Commission to the HAL Company (Plf. Ex. 12, Vol. III); originally that was the assumed name that stood for Harrington, Allgood and Lutes (S.F. 448 and 593); Baton also became a member of the HAL Company, as shown by his filing of the organization report, the reports on the progress of the well, and his own testi-

mony (Plf. Exs. 10, 13, 14, 15, 17, 18, Vol. III, and S.F. 446-448); and they "were all in on the deal to drill the well" (S.F. 447); they were in a meeting and "agreed" to drill it (S.F. 593); they, according to the positive testimony, "drilled the well" (S.F. 447); the HAL Company's office was Harrington's office in the Bramlette Building, Longview (S.F. 594); the HAL Company through Baton filed the completion report (S.F. 449), and also the production reports (S.F. 451-453); Baton furnished certain pipe for the well (S.F. 455); Lutes hired the pumper and gave him orders (S.F. 425-427); Harrington paid the pumper and other expenses (S.F. 427, 456, 457); Allgood paid his proportionate part of the expenses (S.F. 580); and the others also paid their part (S.F. 581); and said parties had an agreement to share the expenses and receive their proportionate share of the income, and carried out that agreement (S.F. 413, 414, 460, 461, 479; Plf. Exs. 57 and 60, S.F. Vol. III). The evidence conclusively established that Harrington, Allgood, Lutes and Baton were mining partners. Not one word of evidence was offered raising a question or contesting that said Petitioners did not "drill" and "operate" the well.

(d) The evidence was uncontroverted that the period of drilling covered sixteen days, beginning on April 6th, and being completed on April 21st (Plf. Exs. 13 and 14, Vol. III), and the time of drilling was admitted by Harrington (S.F. 612).

(e) The evidence, likewise, was uncontroverted that the well was operated, *by producing and being kept in an unplugged condition so that it could produce,* for a period of more than ten years, towit, 3,650 days,

(S.F. 34, and Plf. Exs. 15 through 28, Vol. III); and the well produced during that time 284,133 barrels of oil (S.F. 34), of a value of $661,482.73 (Plf. Ex. 31, Vol. III). No evidence was offered by Petitioners contradicting those facts.

The trial court submitted the case to the jury by instructing it that in determining the amount of penalties to be assessed against the defendants, (Petitioners herein), it could consider (1) the nature and character of the conduct involved, (2) the degree of culpability of the wrongdoer, (3) the extent to which such conduct offends a public sense of justice and propriety, (4) any heedless and reckless disregard of the rights of others, and (5) the character and extent of the injury inflicted. The trial court then submitted issues by which the jury found that the well was bottomed off of the defendants' (Petitioners') lease, and that the penalty for drilling the well during the sixteen days period should be $266.67 per day against Harrington, Allgood and Lutes each, and the penalty for operating the well during the 3,650 days should be as follows: $31.00 per day against Harrington, $15.50 per day against Allgood, $31.00 per day against Lutes, and $2.50 per day against Baton.

On the basis of that verdict the trial court entered judgment in amounts, bearing interest at six percent per annum, against said defendants (Petitioners herein) as follows: Harrington, $117,416.72; Allgood, $60,841.72; Lutes, $117,416.72; and Baton, $9,125.00 (Tr. 213-215). The Supreme Court of Texas has affirmed the trial court and jury.

NO REAL AND SUBSTANTIAL FEDERAL QUESTION PRESENTED TO INVOKE GRANTING OF WRIT

Petitioners have failed to cite any authority or make any necessary showing of a real and substantial Federal question essential to the jurisdiction of the United States Supreme Court over judgments of a state court. Their mere averment of a Federal question or claim of constitutional right is insufficient in the absence of a showing of a real and substantial Federal question deserving of serious consideration. Petitioners' five cited cases on page 3 of their Application do not justify the exercise of jurisdiction by this Court for certiorari.

In *U.S. ex rel. Bryant v. Fay,* 211 F.Supp. 812, cert. den. 375 U.S. 852, the U. S. District Court of New York actually denied the application for habeas corpus where it was caused to appear that the prisoner applicant's sentence was within the statutory limit which was itself constitutional and in the absence of a proper showing of cruel or unusual punishment or double jeopardy.

The second case cited is *Perkins v. State of North Carolina,* 234 F.Supp. 333, which involved the granting of a writ of habeas corpus by a U. S. District Court of North Carolina upon petitioner's showing that he was not afforded counsel in the state post conviction proceeding. This is not relevant to the case at bar, wherein Petitioner Harrington, a lawyer himself, represents the Petitioners in a civil action for civil penalty, and Petitioners make no such contention of deprivation of counsel.

Next cited is the case of *Goss v. Bomar,* 337 F.2d 341, wherein the Circuit Court actually denied the petition for writ of habeas corpus and refused even to consider the federal constitutional issues averred because not passed upon by the highest state court. These questions involved whether a life sentence without the possibility of parole violated the Eighth Amendment prohibiting cruel and unsual punishment. Surely this case does not support Petitioners and is foreign to the case at bar.

Redding v. Pate, 220 F.Supp. 124, involved the exercise of jurisdiction by a U. S. District Court over a claim under the Civil Rights Act against a warden of a state prison for intentional deprivation of essential medical care. Petitioners do not show or claim that any of their rights have been violated under the Civil Rights Act or any other Federal Act.

The fifth case cited by Petitioners is *Douglas v. City of Jeannette,* 130 F.2d 652, affirmed 319 U.S. 157. Here the proper jurisdictional showing was made in the suit to restrain threatened criminal prosecution in a state court for violation of a city ordinance requiring a license and tax before the petitioner could solicit orders for merchandise. The ordinance on its face was a constitutional abridgment of free speech, press, and religion, none of which rights are claimed to be violated by Petitioners in this civil case at bar.

It is, therefore, apparent that Petitioners have failed to discharge their burden in this case to warrant the exercise of this Court of its jurisdiction to grant certiorari. Not one United States Supreme Court case is cited in support of Petitioners' Application that any

of their constitutional rights have been violated or that the Texas statute is unconstitutional. In fact, no decision of any court is cited which holds to the contrary of the Texas Supreme Court decision below on any issue. Petitioners have wholly failed to show that the decision in this case is not in accordance with the applicable decisions of the Supreme Court of the United States or any other court. There is no showing that the decision of the Texas state court affects the scope of prior rulings of the U.S. Supreme Court; nor is there any showing in law or in fact of any infringement of a provision of the Federal Constitution.

Petitioners do merely aver that the Texas statute (Art. 6036, Revised Civil Statutes of Texas, 1925), is unconstitutional, and as the basis of their showing cite only one case, *F. C. Henderson, Inc. v. Railroad Commission of Texas,* 56 F2d 218, which we will show did not invalidate the Texas statutes, is not in point and is readily distinguishable.

It is, therefore, earnestly submitted that the statute in question on its face is constitutional and contains no defects whatever. Consequently, the mere averment of its unconstitutionality by Petitioners as a real and substantial Federal question without color, foundation or ground therefor is an insufficient showing. *New Orleans v. New Orleans Waterworks Co.,* 142 U.S. 79; *Parker v. McLain,* 237 U.S. 469.

TEXAS STATUTE IS CONSTITUTIONAL

Petitioners argue under Point 1 that Article 6036, Revised Civil Statutes of Texas, is unconstitutional on the theory that the statute is so drastic, severe and extreme as to constitute excessive fines and unusual

punishment, deprives Petitioners of their property without due process of law and denies them free access to the courts.

Respondent takes sharp issue and challenges these contentions because the appellate courts have already held Article 6036, R.C.S. constitutional on the exact grounds now urged by Petitioners in this cause.

Although *Culver v. Smith,* 74 S.W.2d 754, 760 (Civ. App. 1935 error ref.), was a decision rendered before the 1935 amendment to the statute, the very philosophy of the present contentions were examined and the penalty statute, which read the same as the present law in this respect, was held constitutional. In that case this court said:

> "Appellants further contend that the penalties of 'not more than One Thousand Dollars ($1,000.00) for each and every day of such violation' of any provision of the act as provided in article 6036, as amended by Acts of the 42d Legislature, 1st Called Session, c. 26 § 3 (Vernon's Ann.Civ. St. Art. 6036), render the act void as being in contravention of section 13 of Article 1 of the Texas Constitution, in that it *imposes excessive fines and authorizes unusual punishment,* and as being in contravention of section 19 of article 1 of the Texas Constitution, and of section 1 of Article 14 of the Amendments to United States Constitution, in that it permits and authorizes the *deprivation of their property without due course of law, and of their liberty without due process of law.* We do not sustain these contentions.
>
> ". . . *The fact that article 6036 imposes a penalty of 'not more than one thousand dollars per day' instead of a flat penalty of $1,000 per day, thus permitting the imposition of a small penalty of*

perhaps only a few cents per day, has been held to be sufficient within itself to take such statute out of the constitutional inhibitions sought to be invoked by appellants. Noble v. Carlton, Governor of Florida, et al. (D.C.) 36 F. (2d) 967." Emphasis added)

The loose language and dicta of a Federal decision construing the 1931 statute cast doubt upon the words "$1,000 dollars per day"; but, even here the court, in passing upon requested injunctive relief, held the more severe wording valid. *F. C. Henderson v. Railroad Commission of Texas,* 56 F.2d 218 (5th Cir. 1932) appeal dismissed 287 U.S. 672.

The Texas Legislature re-enacted this wording of "not more than" in the 1934 and 1935 Amendments to Article 6036, and the Texas Courts thereafter sustained its constitutionality. *Culver v. Smith,* supra; *Culver v. State,* 85 S.W.2d 997 (Civ.App. 1935, error ref.)

A good summation of the law is found in *Roco Refining Co. v. State,* 94 S.W.2d 1214, 1217 (Civ.App. 1936), in which the Court said:

"Appellants' fourth proposition contends that article 6036, R.S. 1925, as amended by Acts 1931, 42d Leg., 1st Called Sess., p. 46, chap. 26, § 3, is unconstitutional and void, as authorizing unusual and excessive punishment, which is the article of the statute under which appellants are sued.

"This proposition has heretofore been passed upon by this court and determined adversely to appellants' contention, in Fleishman v. State (Tex. Civ.App.) 91 S.W.2d 493. Also in the cases of Flannery v. State (Tex.Civ.App.) 85 S.W.(2d) 1052, 1053, and Culver v. Smith (Tex.Civ. App.) 74 S.W.(2d) 754." (Emphasis added)

Since 1919, the statutory law, now embodied in our present laws as Article 6036, contained the work *"not more than"* preceding the penalty amounts. (See Acts of 1919, Reg. Sess., p. 285, Chapter 155, Sec. 7, at page 287 reading *"not more than Five Thousand ($5,000.00) Dollars"*; Acts of 1929, 41st Leg. Reg. Sess., page 694, Chap. 313, Sec. 4, at page 696 reading *"not more than One Thousand ($1,000.00) for each and every day of such violation"*; Acts of 1931, 42nd Leg., 1st C.S., page 46, Chap. 25, Sec. 3, at page 49 reading *"not more than One Thousand Dollars ($1,000.00)*; Acts of 1934, 43rd Leg., 3rd C.S., p. 120, Chap. 64, Sec. 2, at page 121, reading *"not more than One Thousand Dollars ($1,000.00) for each and every day of such violation, and for each and every act of violation"*; Acts of 1935, 44th Leg., Reg. Sess., p. 180, Chap. 76, Sec. 12, at page 188 reading, *"not more than One Thousand Dollars ($1,000.00) for each and every day of such violation, and for each and every act of such violation."*)

These sound principles of law, as approved by the Texas Supreme Court when it refused writ of error as to the opinion of the Austin Court of Civil Appeals in Culver v. Smith, supra, stand as binding precedent in this case.

THE PLEADINGS ENCOMPASSED THE PENALTY IMPOSED

Petitioners contend under Point 2 that the pleadings of the State of Texas did not encompass maintainence of the oil well in an unplugged state as any illegal "operation" of the well.

The crux of the matter involved is whether the pleadings of the State (Respondent) alleging that the De-

fendants (Petitioners) drilled the well and "illegally *operated* said well for a period of over 3,650 days" were sufficient to support a judgment where the proof showed that the defendants maintained the well in an unplugged state for over 3,650 days.

Paragraph 4, Section (i) of Plaintiff's First Amended Original Petition (Tr. 50) is as follows:

> "1. The Defendants violated Railroad Commission State Wide Rule 37, and actually slanted it across the lease line and into the lands of others; *and the Defendants illegally operated said well for a period of over 3,650 days.*" (Emphasis ours)

There is abundant evidence to show that the oil well was deviated contrary to law, and, therefore, illegal. Rule 37(e) dated May 17, 1950 of the Rules of the Railroad Commission, (Plf. Ex. No. 5; S.F. Vol. III), which was then in effect at the time the well was drilled, reads in part as follows:

> "(e) No well drilled in violation of this rule without special permit obtained, issued, or granted in the manner prescribed in said rule, and no well drilled under such special permit or on the Commission's own order which does not conform in all respects to the terms of such permit shall be permitted to produce either oil or gas, *and any such well so drilled in violation of said rule or on the Commission's own order shall be plugged.*" (Emphasis ours)

The record is clear and uncontroverted that the well was not plugged so as to be incapable of producing oil and was therefore operated, i.e., "maintained" in an illegal condition during each and every calendar day as alleged by Appellee.

The Petitioners are confused insofar as this Point is concerned because they are taking the position that "operation" means only "producing", that is, that the allegation that the Defendants illegally "operated" the well means that they "produced" oil from the well. The word "operated" and "produced" in this case are not synonomous. The word "operated" means everything that is done to maintain an oil well so as not to abandon it. If production is stopped for a day in order to clear the well, it is still in "operation". If production ceases a few days in order to repair the pump, it is still in "operation". Therefore, an allegation in a petition of this kind that the well was "operated" for a certain period of time means that the well was being maintained to attain the result appropriate to the nature of the enterprise, that is, maintained so as to produce and be able to produce oil when appropriate to produce the same.

There are a large number of appellate court cases supporting our reasoning on this point. Some of these decisions hold that it is a question of "maintaining" the devise or enterprise in question. In the case of *Concordia-Arrow Flying Service v. City of Concordia,* 289 Pac. 955 (Kan. 1930), the court said that the words "maintain" and "operate" mean the same thing, and the court explained the word "operate" as follows:

> "To operate an airport is to maintain it in a manner to effect accomplishment of results appropriate to the nature of the enterprise."

Cases that show "operation" mean more than "produce" are *Rogers v. Osburn,* 250 S.W.2d 296 (Civ.App. 1952-case reversed on other points by Supreme Court, 261 S.W.2d 311); *Horton v. Benson,* 266 S.W. 213

(Tex.Civ.App. 1924); *Saunders v. Commonwealth Casualty Co.*, 246 S.W. 613 (Mo.Ct.App. 1923).

In this case the evidence is uncontradicted that the Petitioners unlawfully drilled the well in a deviated manner across a boundary line and then maintained it in an unplugged manner. Respondent's pleadings alleged that Petitioners illegally "operated" the well for said period of time. The evidence shows that it did produce through that time, and being maintained in an unplugged condition all of the time so that it could produce oil at a moment's notice. As stated in the case of *Concordia-Arrow Flying Service v. City of Concordia*, supra, the well was "operated" because it was being maintained "in a manner to effect accomplishment of results appropriate to the nature of the enterprise."

The words "produced" and "operated" clearly and concisely convey the idea of maintaining an active open well. It is not necessary to allege further the negative thereof, that is, that Appellants did not plug the well, thereby violating the said rules and statute.

The true test as to the sufficiency of the pleadings of plaintiff in a statutory penalty case is set out in *State v. Arkansas Fuel Oil Co.*, 268 S.W.2d 311, 316, reversed on other grounds, 154 Tex. 573, 280 S.W.2d 723, (1955), wherein it was stated that the petition need only state *"the essential facts necessary to constitute a violation,"* and *"everything that is required to be proved with such degree of certainty as to enable the accused to plead the judgment rendered in bar of a further prosecution for the same offense."*

It is well settled that in penalty suits the plaintiff's

petition is required to state only such *facts* as will bring the case within the provisions of the statute or the law on which the plaintiff relies: *Ford Motor Co. v. State,* 142 Tex. 5, 175 S.W.2d 230 (1943); *Hall v. Penn. R. Co.,* 257 Pa. 54, 100 A. 1035, 1040, L.R.A. 1917-F 414 (1917); and see *State v. Oak Harbor Gas Co.,* 53 Ohio St. 347, 41 N.E. 584, 586 (1895), which clearly holds that a well is being operated even though not producing.

Petitioners' Point 2 is therefore untenable.

NO ERROR IN DEPOSITION RULING

Point 3 of Petitioners complains because the Court of Civil Appeals affirmed the Trial Court's ruling that Defendants (Petitioners) could not take the written interrogatories of the State of Texas without naming the person to answer the interrogatories. Petitioners fail to cite the Court to any case authority to support their contention of unconstitutionality and we can find no such case.

The instrument served on the Attorney General of Texas by the Defendants (Petitioners herein) giving notice of the Interrogatories propounded to the Plaintiff pursuant to Rule 168, Texas Rules of Civil Procedure, (Tr. 20-28) shows on its face that Petitioners were plainly seeking to take the deposition of the State of Texas without naming any official or employee to answer the questions!

Pursuant to the provision in Rule 168, Texas Rules of Civil Procedure, Respondent (State) filed a motion to strike by which it made written objections within ten days to said interrogatories. (Tr. 30-32) The

grounds were that (1) the deposition of the sovereign State of Texas could not be taken, and (2), in the alternative, (a) the deposition inquired as to the allegations relied on by the plaintiff and such matters should be raised by special exception, (b) said interrogatories asked for the names of the witnesses that the plaintiff intended to use and that is not a proper inquiry by deposition, (c) said interrogatories improperly called for disclosure of information obtained by the Attorney General in his investigation, and (d) said interrogatories improperly called for the plaintiff to open its investigation file; and said objections were directed to each interrogatory. (Tr. 30-32)

Respondent's motion to strike, by which said objections to the interrogatories were made, was sustained, and Respondent was relieved of the necessity of answering said interrogatories. (Tr. 43)

Petitioners contend that without naming a specific person they can take the written deposition by written interrogatories of the State of Texas under the authority of Rule 168, Texas Rules of Civil Procedure which became effective in its present wording on September 1, 1962, on the theory that such is allowed by virtue of the words of the rule which provides that "after a party has made appearance in the cause, or time therefor has elapsed, any other party may serve upon such party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information. . ."

Prior to the adoption of the present Rule 168 it was held that: "From the very nature of the thing a

corporation can act only through its officers and agents, and its deposition cannot be taken." *Sauermann v. El Paso Electric Ry. Co.,* 235 S.W. 548 (Comm.App. 1921). Of course, the same reasoning applies to the State, that is "from the very nature of the thing" a State can act only through its officers and agents, and its deposition cannot be taken.

Prior to the adoption of said Rule 168, which is relied on by Petitioners, the Texas courts had held positively that a statute or rule allowing a party to a suit to take the deposition of an opposing party in the suit did not authorize or permit the taking of the deposition of a corporation, unless the statute or rule specifically provided that a corporation's deposition could be taken. In the case of *Sauermann v. El Paso Electric Ry. Co.,* supra, the Supreme Court of Texas, speaking through the Commission of Appeals, held that an ex parte deposition of a corporation could not be taken under the provisions of an amendment in 1897, and in the course of its opinion the court held that prior to the 1897 amendment Article 2293 did not authorize the taking of the deposition of a corporation that was a party to the suit, even though said Article 2293 provided: "Either party to a suit may examine the opposing party as a witness, upon interrogatories filed in the cause. . .".

In the case of *Niemann v. Zarsky,* 233 S.W.2d 930 (Civ.App. 1950), the Court held that the deposition of a corporation party to a suit *could not be taken,* even though the statute, to wit, Article 3769, R. S., which is now section (j) of Rule 188, T.R.C.P., provided that ". . . any *party* to a suit *wherein a corpora-*

tion is a party shall have the right to take written and oral depositions of any *party* to such suit. . .".

The holding in the case at bar is the uniform holding in other states. In 27 C. J. S. 75, Section 29(3) Discovery, it states:

> "In the absence of statutes so providing, the state, when a plaintiff, may not be required, through its officers and agents, to submit to an examination before trial on request of defendant."

In accord are *State v. McCord,* 203 Ala. 347, 83 So. 71 (1919), and *People ex rel Port Petroleum Corporation v. Atlantic Coast Terminals,* 1 N.Y.2d 393, 153 N.Y.S.2d 193 (1956).

Rule 168, Texas Rules of Civil Procedure, as relied on by the Petitioners, provides that any "party" may serve on the other "party" written interrogatories "to be answered by the party served or, if the party served is a public or private corporation . . ., by an officer or agent, who shall furnish such information as is available to the party . . ." That provision might require a corporation to give anwers to a deposition, but it does not require the State to give answers to a deposition. The State is not a corporation. In the case of *Lowenstein v. Evans,* 69 Fed. 908, 911 (C.C.,S.Car. 1895), the Court said:

> "The State is not a corporation. A corporation is a creature of the sovereign power, deriving its life from its creator. The State is a sovereign having no derivative powers, exercising its sovereignty by divine right. The State gets none of its powers from the general government."

On this subject of whether a statute or rule that

provides for the taking of the deposition of a "public corporation" includes the State so as to authorize the taking of its deposition, it was held in the case of *Commissioners Insurance Fund v. Lapidus,* 182 Misc. 368, 50 N.Y.S.2d 589, (1943) that the State was not a "public corporation".

Such is clearly the law in Texas. In *Welch v. State,* 148 S.W.2d 876,879, (Civ.App. 1941, err, ref.), wherein the court held:

> "While in a latitudinous sense, the State may be found within the letter of the phrase 'municipal corporation,' yet, as generally used in law literature and in legislation, we do not think such is true; especially in view of the clearly indicated constitutional meaning of the phrase, we do not think it is true with reference to legislation in this State."

Prior to the adoption of the present Rule 168, the law was clear that the deposition of a corporation and of the State could not be taken. The fact that Rule 168 has a special provision that the deposition of corporation parties can be taken, but does not provide for the State's deposition to be taken, clearly indicates that the makers of the Rule intended that the law as to taking corporations' depositions was to be changed, but that the law as to taking the State's deposition was to remain the same.

The entire argument of Petitioners is that the source of Rule 168 is Federal Rule 33 and that the Federal courts have held that since Rule 33 was adopted, the depositions of the Federal Government, when a party, could be taken under Rule 33 by an opposite party. But it has never been a constitutional requirement that the

state or Federal Government are bound to depose in the absence of a specific rule or statutory requirement.

Rule 168 is not a complete verbatim copy or adoption of Federal Rule 33. It is a rule that brings together already existing provisions of Rules 186a, 186b, and 188, T.R.C.P., providing for the taking of the depositions of opposite parties in a suit, with the added provision for the taking of the deposition of a corporation.

Petitioners' contention that the enactment by the State of a statute or rule similar to a pre-existing Federal statute or rule requires the State to follow the Federal court decisions on the subject is patently fallacious. Petitioners' reasoning is based on a fallacy because it erroneously assumes the absence of pertinent Texas cases.

In the case of *Edwards Mfg. Co. v. Southern Surety Co.*, 283 S.W. 624, 625 (Civ.App. 1926), the court held that the spirit and policy of the law of the state adopting the statute controlled over the construction given by the jurisdiction from which the statute was taken; and in that case the court said:

> "... the rule which presumes the Legislature borrowing a statute adopts also the construction which it had received, is not without qualification and limitation. *If it appears that the construction adopted in the jurisdiction, from which the statute is taken is contrary to the spirit and policy of the jurisprudence of this state, such construction will not be applied.* 25 R.C.L. 1073, 1074. There are many cases in which application of the rule under consideration has been refused."

The same ruling on the law was made in the case of

Consumers Gas & Fuel Co. v. Erwin, 243 S.W. 500, 503 (Civ.App. 1922, error ref.).

The foregoing authorities clearly hold that Texas did not adopt the decisions of the foreign jurisdiction from which the statute or rule was taken, where there are Texas decisions showing the "spirit and policy" of the Texas law on the subject. Texas decisions clearly show that because of the nature of things the deposition of a corporation cannot be taken, and the same rule applies to the State, unless specific authority is granted for the taking of such deposition. Authority to take the State's deposition has not been granted in Texas.

There was another reason why the Petitioners could not take the State's deposition in this case. Petitioners improperly sought by said interrogatories to obtain from Respondent its legal theories as to violations and other information in support thereof. The only proper and authorized way to obtain this type of information was by special exception to Respondent's pleadings; by such method more detailed pleadings could have been required so as to furnish the legal theories, the rules violated, and sufficient information thereon to provide Petitioners with fair notice. To the extent of Petitioners failure to make use of such remedy to obtain the information sought, they must be deemed to have waived their right thereto in that connection under the express wording of Rule 90, Texas Rules of Civil Procedure.

Also, Petitioners improperly sought by aid of interrogatories to obtain information that was privileged, such as confidential statements, names of witnesses, and other matters constituting the attorney's "work prod-

uct" obtained and prepared by the Attorney General and his assistants in their investigation and in anticipation of the trial of such penalty suits, such as the one in the case at bar. The elemental rule prohibiting this improper use of discovery is stated in 20 Tex. Jur.2d 151, Sec. 7, Discovery, Inspection, etc., towit:

> "Discovery procedure cannot be used to deprive parties of the immunities and privileges to which they are otherwise entitled."

It is also stated in 20 Tex.Jur.2d 149, Sec. 3, Discovery, Inspection, etc, that, ". . . a bill of discovery will not lie to discover the names of an adversary's witnesses." This rule was fully discussed and followed, and the Federal rule rejected, in the case of *Ex Parte Ladon,* 160 Tex. 7, 325 S.W.2d 121 (1959).

In 27 C.J.S. 225, Sec. 72, Discovery, the applicable general rule is well-stated as follows:

> "In general, documents of a client in the hands of an attorney are privileged from production or inspection at the instance of third persons, as are documents or matters which constitute part of the work product of the adverse party or his counsel in connection with the preparations for the trial, that is, any data and material obtained or prepared by the adverse party, his counsel, or some other person on his behalf, in anticipation of litigation or in the preparation for trial . . ."

The fact that the plaintiff was the State of Texas or that the remedy was sought against the Attorney General did not prohibit this general rule from being applicable, as shown in 27 C.J.S. 116, Sec. 35, Discovery, wherein it is clearly stated as follows:

> "Generally, the *information received* or the rec-

ords made thereof *by public investigating officials* is not subject to disclosure or inspection in a pre-trial discovery proceeding . . ." (Emphasis ours)

Petitioners had the burden under their discovery process to bring themselves within some unusual exception to this general rule, which they wholly failed to do. Petitioners were seeking to obtain a class of records, that is, Respondent's evidence, confidential communications and papers not required by law to be kept, which were not public records and which class of records are generally held not to be subject to the right of inspection or disclosure by the adverse party. 27 C.J.S. 224, Sec. 72, Discovery. See also the holding and discussion in the case of *Mathews v. Pyle,* 75 Ariz. 76, 251 p.2d 893, 896 (1952), wherein the court held that the documents concerning the Arizona Attorney General's investigation of the affairs of the office of State Land Commissioner were not public records subject to inspection by any citizen.

Lastly, we wish to call to this Court's attention the fact that there is no showing, or even a contention, that the Petitioners suffered any harm or injury as a result of their not being allowed to take the deposition of the State of Texas. The burden to show *abuse of discretion* and *probable harm or prejudice* from the record made in discovery proceedings under such rules as Rule 167 or 168, T.R.C.P. is upon Petitioners, who have herein failed to discharge such burden under Rule 434, T.R.C.P. *Gale v. Spriggs,* 346 S.W.2d 620, 623-625. (Civ.App. 1961, error ref. n.r.e.). The record in this case actually reflects that Petitioners received all of the information which they sought, and to which they were entitled from the amended pleadings of Peti-

tioners filed in advance of the trial. Petitioners have wholly failed to show any harm resulting to them from not receiving such information earlier at the pre-trial hearing.

No Right of Trial by Jury Denied By Use of Rule 270

Petitioners' Point 4 is that the application of Rule 270, Texas Rules of Civil Procedure, to their case in effect deprived them of a jury trial in violation of the Fourteenth Amendment of the U.S, Constitution. The rule reads:

> "Rule 270. Additional Testimony
>
> At any time the court may permit additional evidence to be offered where it clearly appears to be necessary to the due administration of justice. Provided in a jury case no evidence in a controversial matter shall be received after the verdict of the jury."

The Supreme Court of Texas has found and held that in the case at bar no evidence on a controversial matter was received. The basis of this is that there was no testimony or evidence introduced in the case by Petitioners to show that it took less than their self-admitted sixteen days (Plaintiff's Exhibits 13 & 14, S.F. Vol. III, being certified copies of the official well record and completion reports signed by one of the Petitioners) to drill the well and which was acknowledged by Petitioner Harrington in the deposition taken of him prior to trial (S.F. 607, 609, 612, 613). The 3,650 days the well was operated unplugged was also undisputed (S.F. 34, Plaintiff's Exhibits 15 through 28, Vol. III), and no controverting testimony

or evidence was offered by Petitioners of a lesser number of days of operation.

Prior to the entry of the judgment, Respondent filed its Motion under Rule 270 for admission of additional evidence of a non-controversial nature (Tr. 176-179), as did one of Petitioners (Tr. 182-185). Both motions were granted (Tr. 213-215), and Petitioners introduced their additional evidence (S.F. 599-602) as did Respondents (S.F. 607). Respondent's Motion gave Petitioners complete notice of the evidence to be offered (Tr. 175) well in advance of the hearing (S.F. 603). The evidence was not controverted by Petitioners and was conclusive. It could not, therefore, be a controversial factual matter requiring the jury's determination.

Rule 270 has long been upheld in Texas courts as a proper procedure and proper due process. *Prescott-Phoenix Oil & Gas Co. v. Gilliland Oil Co.,* 241 S.W. 775 (Tex.Civ.App. 1922); *McAdams v. Dallas Railway & Terminal Co.,* 149 Tex. 217, 229 S.W.2d 1012 (1950). The trial court ruling will not be reversed in the absence of a showing of abuse of discretion, *John F. Buckner & Sons v. Allen,* 272 S.W.2d 929 (Tex.Civ.App. 1954, error dism.), which is not shown in the case at bar. Petitioners have failed to cite any case anywhere to show that the application of such a rule violates the due process clause of the Fourteenth Amendment of the U.S. Constitution, and we can find no such case.

The filing by Petitioners of a general denial in their pleadings does not render undisputed evidence as "controversial" under Rule 270. *City of Winters v. Bethune,* 111 S.W.2d 797 (Tex.Civ.App. 1937, error dism.)

Petitioners' Point 4 is thus clearly without merit, and no required basis is shown for this Court to exercise its jurisdiction on application for writ of certiorari.

Mass Television and Press Publicity Not Shown in Record

Petitioner's Point 5 is that the mass of television reports and press releases deprived them of a fair and impartial trial is wholly without merit. Nowhere in the record is any showing whatever made of any prejudical television or press publicity which was calculated to deprive petitioners of a fair trial before fair and impartial jurors. This issue was never presented to the trial court, intermediate appellate court or the Supreme Court until Petitioner's Motion for Rehearing in the latter Court. No evidence or proof was there presented and none is presented here. Thus, such a matter not properly urged below will not be considered here in an application for writ of certiorari. 54 Am. Juris. 901-902, Sec. 263, U.S. Courts.

Unless the alleged adverse publicity is shown by the record to have fatally infected the trial, there is no basis for the court to infer or presume that such publicity made petitioner's trial a meaningless formality. *Beck v. Washington,* 369 U.S. 541 (1962).

The burden of showing essential unfairness is upon the petitioner who claims such injustice and seeks to have the result set aside, and the showing must be a "demonstrable reality," not just speculation. *Darcy v. Handy,* 351 U.S. 454 (1956); *Adams v. United States,* 317 U.S. 269, 281 (1943).

Petitioner must show just how the publicity prejudiced the jury in arriving at their verdict and he should move for a change of venue or show at some stage of the trial proceedings that some juror was in fact prejudiced by the publicity. *Stroble v. California,* 343 U.S. 181 (1952). There must be a "convincing showing of actual bias on the part of the jury." *Buchalter v. New York,* 319 U.S. 427 (1943); *Reynolds v. United States,* 98 U.S. 145 (1878).

Petitioners have wholly failed in every respect. The case at bar was not televised, and there was no motion or attempt by petitioner at any stage of the trial proceedings to have the court transfer the venue. No juror was challenged on the ground of prejudice, and no complaint was made to the court to limit the press or publicity coverage. This was a civil penalty case, not a criminal case as were *Estes v. Texas,* 381 U.S. 532 (1965) and *Sheppard v. Maxwell,* 384 U.S. 333 (1966). Petitioners do not show themselves to be notorious persons who had been the subject of great publicity during a highly publicized trial. No occurrences are shown at or during the trial, or in pre-trial proceedings. The *Estes* and *Sheppard* cases are not in any way analogous, wherein a showing was made of a "carnival atmosphere" at the trial, unlimited presence of the press there, and the failure of the trial judge, upon proper request of the defendant's counsel, to control and limit the press attendant there, where full verbatim testimony of the witnesses was made available to them during the trial.

In the absence of a showing of *specific prejudice,* this Court has refused to reverse a lower court on due process grounds based on such a charge of mass

publicity precluding a fair trial. It is only in a televised criminal case, where the defendants themselves were shown to the public, that this Court could find inherent prejudice for reversal. *Estes v. Texas*, supra; *Rideau v. Louisiana*, 373 U.S. 723 (1963).

For all of the above obvious reasons, Petitioner's Point 5 is absolutely untenable.

CONCLUSION

Respondent asks that the petition for writ of certiorari be denied, because the questions raised in the petition were correctly decided by the Supreme Court of Texas, and clearly no substantial Federal questions are presented in this Court.

Respectfully submitted,

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PROOF OF SERVICE

I, Roger Tyler, attorney for Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 8th day of February, 1967, I served copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari on H. M. Harrington, Jr., attorney for Petitioner, by mailing a copy in a duly addressed envelope, first class mail, postage prepaid, at the address of 324 Bramlette Building, Longview, Texas.

Roger Tyler
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